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Paul H. Gessaman

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NebFact



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Joint Tenancy as an Estate Planning Tool

Paul H. Gessaman, Extension Economist

This is one in a series of **NebFacts** providing information on the use of estate planning "tools" — mechanisms that can be used in attaining desired estate planning outcomes. Titles in the series are listed following the last narrative section of each document. Reading the documents in this series will improve your understanding of estate planning tools and alternatives, and make it easier to communicate with your attorney, accountant, and other helpers when your estate plan is prepared.

Your need for legal and tax advice: While the information contained in this document is thought to be accurate, it should not be used as a substitute for legal advice on matters related to business organization, taxation, estate planning, gifting of assets, life insurance, or other business and financial management matters. Consult with your legal and tax advisers before making decisions.

What is joint tenancy?

Joint tenancy usually is set up through a will, a deed, or other title document prepared by an attorney on behalf of a client. It also can be established through probate of an estate in which a bequest is left to two or more persons who are stipulated as joint tenants. Joint tenancy often is used as a means of estate plan implementation — the use addressed in this NebFact.

Joint tenancy is a way of sharing ownership among two or more persons in which each joint tenant holds an equal and undivided interest in the property. (If the ownership interests are not equal, "tenants in common" ownership applies. See *NF96-294, Tenants In Common As An Estate Planning Tool.*) Succession in ownership of joint tenancy property is not affected by any designation of heirs contained in a will prepared by the deceased. Title to joint tenancy property passes to the surviving joint tenant(s) outside the probate process for the deceased's estate.

Under joint tenancy, the deceased's ownership interest automatically is transferred to surviving joint tenant(s) upon the death of any joint tenant. Upon the death of one of two joint tenants, the ownership interest of the deceased passes to the survivor and the joint tenancy ends. If three or more persons are joint tenants and one dies, the ownership interest of the deceased is divided equally among all surviving

joint tenants and the joint tenancy continues.

In some circumstances, joint tenancy can be terminated inadvertently by actions resulting in partial liquidation of the joint tenancy asset. In some jurisdictions, increasing debt on joint tenancy property is considered to be a partial liquidation and has been treated as a termination of the joint tenancy. A joint tenancy ownership interest can be sold by a joint tenant with or without the agreement of the other joint tenant(s).

Estate tax implications of joint tenancy differ depending on the time at which the joint tenancy was established. Some pre-1986 transfers to joint tenancy of property previously owned by one spouse are viewed as having created a gifting situation. Gifting is not a consideration in establishing joint tenancy between spouses where the joint tenancy was established after January 1, 1986. Because there are other infrequently applicable exceptions to the general rules mentioned here, be certain to secure legal and tax advice before establishing a joint tenancy on property held under other forms of ownership.

What types of property typically are included in a joint tenancy?

Almost any type of property for which ownership can be established can be held in joint tenancy. Business and personal property including land, improvements to land, fixtures and equipment, vehicles, bank accounts, and the family home often are placed in joint tenancy. When the property is an intangible asset or personal property such as fixtures and equipment, vehicles, inventory, bank account or financial document (e.g., a Certificate of Deposit), or household furnishings the right of survivorship should be stated to ensure title passes to the survivor. ("WROS" or "With Rights of Survivorship" is stated on the title.)

Because of issues that may arise when personal property is held in joint tenancy, legal advice prior to establishing a joint tenancy arrangement is desirable. Be sure you know and understand the legal and tax ramifications before establishing joint tenancy ownership.

How is joint tenancy used in estate planning?

Joint tenancy between husband and wife often is used as the means of holding title to business real estate, a home, bank accounts, and financial "paper" other than U.S. Savings Bonds, and treasury bills, notes, and bonds. Depending on the size of their property holdings, this can be a good approach or can cause unnecessarily high estate tax liabilities. Here are very brief comparisons of these two situations:

- The spouses hold much or nearly all of their property in joint tenancy. Upon the death of the first to die, his or her property interest passes directly to the surviving spouse. No estate tax is due on the value of the joint tenancy property regardless of its value as succession occurs under the unlimited marital deduction. Upon the death of the surviving spouse, the total of his or her taxable gifts and net estate **is less than** \$600,000. No federal estate tax is due. Joint tenancy has not resulted in unnecessary estate tax costs.
- The spouses hold much or nearly all of their property in joint tenancy. Upon the death of the first to die, his or her property interest passes directly to the surviving spouse. No estate tax is due on the value of the joint tenancy property regardless of its value as succession occurs under the unlimited marital deduction. Upon the death of the surviving spouse, the total of his or her taxable gifts and net estate **is more than** \$600,000. The federal estate tax rate on the above-\$600,000 portion of this estate is at least 37 percent. In this case, holding assets in joint tenancy with rights of survivorship resulted in partial or complete loss of the \$600,000 exemption of the first to die

and unnecessary estate tax costs.

The federal estate tax exemption of the first to die could have been preserved by an estate plan that set up direct succession in ownership of assets valued at \$600,000 by a member of the next generation while retaining a life estate for the surviving spouse. This could have reduced the total of taxable gifts and net estate of the second to die by up to \$600,000. Federal estate tax costs would have been reduced — possibly it could have been avoided for both estates.

When the total value of the combined estate exceeds \$600,000, or when the total of taxable gifts and the estate of the surviving spouse exceeds \$600,000, holding property in joint tenancy with rights of survivorship can result in otherwise avoidable taxation at the time of probate of the estate of the second to die. In most cases, the estate tax liability can be reduced by using joint tenancy ownership in combination with other estate planning tools. It's very important to secure professional advice specific to your situation and estate planning intentions if the total of your taxable gifts and your net estate is likely to be valued at more than \$600,000 — the amount sheltered by the unified federal gift and estate tax credit.

Be sure to keep in mind that placing two names on US Savings Bonds or other US Treasury securities **does not** create joint tenancy ownership. The persons whose names are listed are co-owners. Either can redeem a savings bond or security at any time. Even when the person redeeming a bond or other treasury security acquired it as a survivor the ownership was not a joint tenancy and, for estate tax purposes, the bond or security is included in the estate of the deceased.

Is joint tenancy an adequate means of implementing my estate planning?

Generally, joint tenancy with rights of survivorship **is not** adequate as the only tool used in your estate planning. Even if joint tenancy with rights of survivorship is a suitable way of arranging succession for your principal assets, your will is needed:

- to indicate your choice of personal representative of your estate;
- to guide your personal representative as he or she carries out your instructions for the probate of your estate;
- to ensure that your choice of guardian for minor children or other dependents is known;
- to ensure your instructions are carried out for property that's not held in joint tenancy and/or any property you inherit or acquire after preparing your estate plan;
- or in event of changes in family membership or changes in family relationships.

What are causes of concern about use of joint tenancy?

Principal limitations or causes of concern relative to use of joint tenancy include:

- once established, joint tenancies with minors cannot be terminated even where there are good reasons for doing so — a death that results in a person under legal age becoming a surviving owner could result in control of assets moving to a person who has demonstrated, or is demonstrating, inability to be responsible in that role;
- a death resulting in a minor becoming a surviving owner requires a guardianship be established until the owner reaches the age of majority (age 19 in Nebraska) — if the guardianship estate is large and/or contains assets requiring intensive management, the guardianship could be expensive and difficult to maintain;
- the outcomes of joint tenancies are completely inflexible at the time of death of the first to die;

- when property moves to the surviving joint tenant(s), only the ownership interest of the deceased (one-half or less) has its basis "marked up" (increased) as the remainder retains its original cost basis for income tax purposes — this can result in high income tax liabilities when (if) the property is sold by the surviving joint tenant(s);
- any joint tenant may force a division of the property by going to court and requesting that it be partitioned.

Glossary

Intangible property

Property that only represents real value such as bonds, stock certificates, promissory notes, certificates of deposit, bank accounts, contracts, leases, and other similar items.

Joint tenancy

A form of joint asset ownership by two or more persons in which each person has an equal undivided ownership interest that passes directly to the surviving joint tenant(s) upon the death of any joint tenant. Real estate held in joint tenancy does not pass through probate following the death of a person with an ownership interest. Personal property such as fixtures and equipment, inventories, or vehicles held in joint tenancy does not pass through probate if the right of survivorship is stated in the title to the property. Any joint tenant can petition the court and compel partition of a joint tenancy asset.

Partition

The judicial separation of the respective interests in property of joint owners or tenants in common so each may take possession, enjoy, and control his or her share of the property.

Tangible property

Property that is capable of being perceived by the senses. Generally, tangible property is real estate, personal property, or moveable property that has value of its own and is not merely a representation of real value. Land, machinery, buildings, business equipment, inventories, homes, and furnishings are examples of tangible property.

Tenants in common

A form of asset ownership in which two or more persons have an undivided interest in the asset, where the ownership shares are not required to be equal, and where ownership interests can be inherited.

Undivided interest

The interest or right in property owned by each joint tenant or tenant in common. Each tenant has equal right to use and enjoy the entire property. Unless an agreement to the contrary exists, each tenant is entitled to an income share proportional to his or her ownership interest. If the property is sold, the sale proceeds are shared among tenants in proportion to the ownership shares held by each tenant.

Documents in This Series:

- NF 95-236, *Nebraska Inheritance and Estate Taxes*
- NF 96-291, *Intestate Succession As An Estate Planning Tool*
- NF 96-292, *A Will As An Estate Planning Tool*
- NF 96-294, *Tenants In Common Ownership As An Estate Planning Tool*
- NF 96-295, *A Trust As An Estate Planning Tool*
- NF 96-296, *Gifting As An Estate Planning Tool*
- NF 96-297, *Life Insurance As An Estate Planning Tool*
- NF 96-298, *Charitable Remainder Trusts and Charitable Annuities As Estate Planning Tools*
- NF 96-299, *Estate Planning Glossary*

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